Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

GLENN J. CONROY,

Petitioner,

v.

ABRAHAM CHEVROLET-TAMPA, INC.,
d/b/a AUTOWAY CHEVROLET,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

CRAIG L. BERMAN
THE BERMAN LAW FIRM, P.A.
111 Second Avenue N.E.
Suite 810
St. Petersburg, Florida 33701
Telephone (727) 550-8989

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

"Pretext" instructions tell jurors in discrimination cases that they are permitted, but not required, to find a defendant intentionally discriminated if they do not believe the defendant's explanation for its challenged action. Expressly acknowledging a multi-circuit conflict, the court of appeals held that pretext instructions are unnecessary. The questions presented are:

1. Should courts give jurors pretext instructions in discrimination cases?

2. If so, is the failure to give a pretext instruction prejudicial if the plaintiff is allowed to argue pretext to the jury?

3. If so, was the petitioner prejudiced in this case?

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PETITION FOR A WRIT OF CERTIORARI

Glenn J. Conroy respectfully petitions for a writ of certiorari to review the judgment of the United States Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-18a) is reported at 375 F.3d 1228 (CA11 2004). The district court's order denying the Petitioner's motion for a new trial (App., *infra*, 19a-29a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 30, 2003. This Court granted a two-week extension of time for filing the petition on September 27, 2004, No. 04A-243. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant portion of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(a), provides: "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * * ."

STATEMENT

On two occasions, the Court has had to resolve a multi-circuit conflict regarding the legal significance of pretext in discrimination cases, specifically the significance that judges should assign pretext evidence. This case presents another multi-circuit conflict regarding pretext, but is directed to the significance that jurors should assign pretext, and whether the failure to instruct them on pretext is prejudicial.

In the first pretext case, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court said: "The factfinder's disbelief of the reasons put forward by the defendant * * * may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination * * * ." *Id.* at 511 (footnote omitted).

Although the Court rejected the "pretext-plus" approach to discrimination analysis in *Hicks*, some federal courts did not sufficiently understand the decision and required more of plaintiffs than a prima facie case and evidence of pretext. So, in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 146-49 (2000), the Court again explained that a factfinder may, but need not, find an employer discriminated if the factfinder disbelieves the employer's explanation for its challenged action. The Court did not address whether lay jurors needed to be told what a large portion of the federal judiciary had been unable to grasp without repeated instruction from the Court.

Coming in the wake of *Hicks* and *Reeves*, this case presents two important questions: should district courts

instruct juries that a finding of pretext is a basis to infer discrimination; if so, does the failure to give such an instruction cause prejudice if the plaintiff is allowed to argue pretext to the jury? The court of appeals expressly acknowledged that there was a multi-circuit conflict as to the first issue, and four circuits have confronted the closely-related second issue, with conflicting results. The Court should resolve the conflicts and bring clarity to this area of federal law.

A. The Background of the Case Leading up to the Charge Conference

The petitioner, Glenn Conroy, joined Abraham Chevrolet as a sales manager for its commercial fleet department when he was 54 years old.[1] William Bledsoe became the general manager of the dealership seven months later and remained there for six months, until he was fired.

When Bledsoe first took over as general manager he expressed some concern to Conroy about the commercial department's poor performance. During his tenure, Bledsoe also allegedly made frequent ageist comments, referring to the staff in the commercial sales department as "geriatrics" and referring to older employees as "old-geezer," "old-fart," and "dead wood."

Bledsoe admitted making some of these comments, but claimed they were slang expressions and that he did not realize they would offend some employees. Bledsoe also admitted mentioning his desire to hire "younger and

[1] Except where citations are given, all procedural history and facts in this Statement come from the court of appeals' decision, which is located in the appendix at 1a-18a.

more aggressive people," but stated that he was speaking figuratively, and not literally.[2] At one point, Bledsoe and Conroy discussed 70-year-old salesman Dick Weber's gross profit margins, and Bledsoe allegedly stated "why don't you just get rid of the old geezer." Doc. 66 at 41.

On January 15, 2001, several months after taking over, Bledsoe fired Conroy, explaining that Conroy was doing a good job but that the company was going in a different direction. On the same day, Bledsoe replaced Conroy with Joel Early, a man in his early 40's. Doc. 65 at 135, 144-45; Doc. 66 at 155.

Although Bledsoe told Early he was being hired on a probationary basis and had to prove himself (Doc. 65 at 129, 136), Bledsoe testified that he had no actual plans to replace Early when he hired him. Doc. 66 at 181-83. Early was given a temporary pay plan that extended through the end of March and was told to hire new staff for the commercial department. *Id.* at 181-83.

In obtaining unemployment benefits, Conroy learned that Bledsoe's written explanation to the Florida Department of Labor for discharging Conroy was "unsatisfactory performance." Doc. 66 at 94-95. In February, Conroy

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[2] Although Bledsoe claimed that the phrases were used figuratively (Doc. 66 at 128), he later testified to a more literal use:

> I guess some people just stand around and they don't take action. They don't make phone calls. They don't go out on the lot and help people. They don't, they are not active. And I guess *I equate people that are younger as taking action and being able to get out and do things, to be physically more active*. And typically, that is something good in a sales environment. That's certainly what we look for at Lazy Days.

Doc. 66 at 133 (emphasis added).

contacted Roberta Bonavia, the human resources director of Abraham Chevrolet's parent company, Auto Nation, Inc. Conroy told Bonavia that he believed his age was the reason that Abraham Chevrolet had discharged him, not poor performance. Doc. 66 at 94 (Conroy: I "told her the situation that I felt that I was being discriminated against because of my age").

Following her meeting with Conroy, Bonavia spoke with Bledsoe about the reason for Conroy's discharge and they agreed that, at least officially, Conroy had been terminated for reasons "other than unsatisfactory performance." Doc. 66 at 15; Doc. 67 at 18-19. Shortly thereafter, Bledsoe discharged Early and replaced him with Randy Clark, who was two years older than Conroy. Doc. 66 at 94, 200. When asked at trial why he fired Early, Bledsoe could not recall any reason. *Id.* at 184.

In his written response to Conroy's EEOC discrimination charge, Bledsoe asserted that age was not a factor in his decision to fire Conroy, "particularly since the new replacement is actually two years older than [Conroy]." Doc. 66 at 173-74. When asked at trial why he didn't tell the EEOC that he had initially promoted a much younger employee (Early) to take Conroy's place, Bledsoe stated, "I don't think it was pertinent." *Id.* at 175.

Conroy eventually filed a complaint against Abraham Chevrolet under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, alleging that Bledsoe had fired him because of his age and in wrongful retaliation for his refusal to fire Weber. Abraham Chevrolet defended by claiming that had it terminated Conroy for poor performance. At trial, Bonavia testified she believed Bledsoe had told Conroy that he was doing a good job and that the

department was going in another direction just to "soften the blow," as opposed to telling Conroy the *real* truth, that he was being fired for poor performance.

Abraham Chevrolet asked Bonavia if, when investigating Conroy's claims after his discharge, she had looked into industry standards regarding the number of sales and amount of profits each sales associate should produce. Bonavia responded that General Motors' benchmarks suggested sales associates should sell about 12 to 15 cars per month and account for $20,000 in profit, while Conroy's department had never performed within this range.[3]

She then stated that it was not unusual for this kind of poor performance to result in termination. Bonavia, however, was not involved in the decision to terminate Conroy. Doc. 67 at 5-6. And while the decision-maker, Bledsoe, had been aware of the standards GM provides the dealerships buying and selling its cars, "these were simply benchmarks that Bledsoe testified were available to him at the time he discharged Conroy." App., *infra*, 8a.

B. The Charge Conference, the Verdict, and the Judgment

During the jury charge conference, Conroy proposed a pretext instruction that would have told the jurors they

[3] Conroy testified that the standard was actually 8 to 12 vehicles per month (Doc. 66 at 102, 109-110), and there was substantial evidence that he had performed well for the company. *Id.* at 45-46, 73-74, 76, 101-102, 110; *see* Amicus Curiae Brief of the U.S. Equal Opportunity Commission, http://pacer.ca11.uscourts.gov/PCRPJ2OY.PDF, at pp. 6-9 (discussing Conroy's performance and the factual dispute over why he was discharged).

were permitted, but not required, to infer discrimination or retaliation if they disbelieved Abraham Chevrolet's explanation for firing him. Although it gave the jurors a pattern instruction on business judgment,[4] the district court refused to instruct the jurors regarding pretext.

The court allowed Conroy's counsel to argue pretext in his closing statement. The court also gave the jurors the form instructions on drawing inferences from evidence (App., *infra*, 6a n.2), weighing the credibility of witnesses (App., *infra*, 6a-7a n.3), and burden of proof (App., *infra*, 7a n.4).

The jury returned a defense verdict.[5] The court denied Conroy's motion for new trial and entered judgment for Abraham Chevrolet. Conroy appealed to the Eleventh Circuit.

C. The Court of Appeals' Decision

The Eleventh Circuit affirmed, holding that pretext instructions are unnecessary in discrimination cases and that standard instructions regarding burden of proof, witness credibility and reasonable inferences, coupled with

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[4] The business judgment instruction told the jurors:

> [T]he law applicable to this case requires only that an employer not discriminate against an employee *because of the employee's age*. So far as you are concerned in this case, an employer may discharge, refuse to promote or otherwise adversely affect an employee for *any other reason, good or bad, fair or unfair* * * *.

(Doc. 49 at 15) (emphasis added).

[5] The verdict form reveals that the jury initially checked "yes" as to the age discrimination claim but, after crossing through this determination, checked "no" (Doc. 51).

argument of counsel, are a collective, adequate substitute for pretext instructions.

The court did, however, find that Conroy's proposed instruction accurately stated the law: "We agree with Conroy that his proposed instruction on pretext accurately states the law––the jury's disbelief of an employer's stated reason for termination may be enough to infer intentional discrimination." App., *infra*, 9a.

The court also expressly acknowledged the multi-circuit conflict that its decision exacerbated:

> We do realize that some circuits, in the wake of *Reeves,* now require the district courts to include a pretext instruction in their jury charge. * * * [O]ther circuits have not interpreted *Reeves* to require a pretext instruction. * * * We agree with those circuits that have not held *Reeves* to govern the question of whether a pretext instruction is necessary, and therefore conclude that *Reeves* does not limit *Palmer* as binding precedent for this Court.

App., *infra*, 10a-11a; *see also id.* at 10a n.5 (discussing the pre-*Reeves* circuit split). The concurrence disagreed with the majority's conclusion that pretext instructions are not required in discrimination cases, but believed that Conroy was "probably" not prejudiced.

REASONS FOR GRANTING THE PETITION

There was a circuit split over whether pretext instructions are necessary in discrimination cases even before *Reeves*. Since *Reeves*, the split has become far more severe. As the Eleventh Circuit acknowledged, its decision aligns

that court with three other circuits on this issue and brings the court in conflict with four circuits. The time has come for this Court to resolve the split, as well as the closely related question of whether closing argument is an adequate substitute for a pretext instruction.

I. The Court of Appeals' Decision that Jury Instructions Regarding Pretext are Unnecessary in Discrimination Cases Aligns that Court with the First, Eighth and Seventh Circuits and Brings the Court in Conflict with the Second, Third, Fifth and Tenth Circuits.

This case presents a clear conflict in the circuits: ***Compare*** *Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 280 (CA3 1998) ("[J]urors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision."); *Ratliff v. City of Gainesville, Tex.,* 256 F.3d 355, 364 (CA5 2001) ("[T]he district court erred in failing to give an inference instruction and [in] holding jurors to a 'pretext plus' standard."); *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d 568 (CA5 2004) (two members of panel following but disagreeing with *Ratliff*); *Townsend v. Lumbermens Mut. Cas. Co.,* 294 F.3d 1232, 1241 (CA10 2002) ("[A] trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may––but need not––infer that the employer's true motive was discriminatory"; a permissive pretext instruction is required when "a rational finder of fact could reasonably find the defendant's explanation false."); *Cabrera v. Jakabovitz,*

24 F.3d 372, 382 (CA2 1994) (explaining in *dicta* that the jury must be informed that it "is entitled to infer, but need not infer" that the plaintiff's burden has been met if it finds that the plaintiff has proved its prima facie case of discrimination and "they disbelieve the defendant's explanation"); ***with*** *Gehring v. Case Corp.*, 43 F.3d 340, 343 (CA7 1994), *cert. denied*, 515 U.S. 1159 (1995) ("[The plaintiff] also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, but a judge need not deliver instructions describing all valid legal principles.") (citation omitted); *Conroy*, 375 F.3d at 1235, App. *infra*, 14a (CA11 2004) ("[T]he district courts, though permitted, are not required to give the jury a specific instruction on pretext in employment discrimination cases.") (footnote omitted); ***see also*** *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-90 (CA8 2001) (noting circuit split and expressing doubt that it could ever be reversible error to deny a requested pretext instruction; no error where instructions accurately stated the law and did not preclude the jury from finding pretext); *Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (CA1 2000) (though the court found that plaintiff did not properly request a pretext instruction, it expressly doubted that a pretext instruction could be required).

Only four circuits have not addressed the issue: the Fourth, Sixth, Ninth and District of Columbia Circuits.

II. The Court of Appeals' Conclusion that Closing Argument Prevents Prejudice Where No Pretext Instruction is Given Adds to a Circuit Conflict.

As for the closely related question of whether the failure to give a pretext instruction can be prejudicial if counsel is permitted to make closing argument about pretext, the circuits have reached conflicting conclusions:

In the Fifth Circuit, a two-judge panel that disagreed with, but felt bound by, circuit precedent requiring pretext instructions held that closing argument is a sufficient substitute if a district court erroneously fails to give the instruction. *Kanida*, 363 F.3d at 579 (CA5) ("[T]rial counsel was able to present the jury with the inferences they were permitted to make from the evidence. Consequently we cannot conclude that Kanida was seriously impaired in presenting her claim.").

Of the other circuits requiring pretext instructions, only one has felt it necessary to explain that closing argument is inadequate to prevent prejudice. *See Townsend*, 294 F.3d at 1241 (CA10) (expressly rejecting dissent's argument that an "aggressive closing argument" based on pretext prevents prejudice to plaintiffs, *id.* at 1246-47 (Brorby, J., dissenting)).

Three circuits that disfavor requiring pretext instructions have addressed the issue in their decisions and--predictably--held that closing argument is sufficient to prevent prejudice. *See Gehring*, 43 F.3d at 343 (CA7) (The plaintiff's "lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary."); *Moore*, 249 F.3d at 791 (CA8)

("If the jury had accepted Moore's pretext arguments it would have been required to find in his favor under the instructions provided by the District Court. Therefore, even if there were instructional error, Moore incurred no prejudice."); *Conroy*, 375 F.3d at 1235, App., *infra*, 13a (CA11) (closing argument is "significant" in preventing prejudice); 375 F.3d at 1236-37, App., *infra*, 17a-18a (Wilson, J., concurring) (closing argument "mitigated" prejudice).

III. The Decision of the Court of Appeals is Incorrect.

A. The Significance of Pretext Evidence in Discrimination Cases is Too Difficult for Lay Jurors to Deduce Without Instruction.

Given the federal judiciary's struggle to understand the significance of pretext in federal discrimination cases, judges hearing such cases should explain that significance to lay jurors:

> As [*Hicks* and *Reeves*] demonstrate, [pretext] has been a difficult matter for courts, a likely indication that it will also be difficult for jurors. * * * I consider the danger great that a jury might make the same mistake that many courts continued to make even after *Hicks*. Jurors are likely to be confused where, as here, the law the jury should have been instructed on has proven too difficult even for federal courts to discern without repeated guidance from the Supreme Court.
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> * * *

> Providing the jurors clarification on a point of law that has eluded federal courts until quite recently is more than appropriate. It should be *required.*

App., *infra*, 16a (Wilson, J., concurring).

The majority reasoned that standard instructions regarding burden of proof, reasonable inferences, and witness credibility, coupled with closing argument, adequately compensate for the lack of a pretext instruction. Such instructions and argument hardly ensure that jurors understand the significance of pretext. Considering the burden of proof and the business judgment instructions they receive, jurors are more likely left with the impression that––without other evidence of intentional discrimination––they are not permitted to find a defendant discriminated even if they disbelieve the defendant's reason for its action.

B. Standard Instructions About Reasonable Inferences and Witness Credibility are an Inadequate Substitute for a Pretext Instruction.

An appellant challenging the jury instructions that a district court has given must show prejudice. But when "the jury is not informed of the test to apply to testimony, [the reviewing court] cannot presume an absence of prejudice." *Dressler v. Busch Entm't Corp.*, 143 F.3d 778, 781 (CA3 1998).

Standard instructions regarding reasonable inferences based on "common sense" and witness credibility do not ensure that jurors understand the significance of pretext.

As the concurrence in the court of appeals explained regarding the reasonable inference instruction:

> [S]uch an instruction does not mean that the jury will know without being told that its disbelief in the employer's proffered reason may be evidence that will support a finding of intentional discrimination. *In light of the amount of case law dedicated to shaping and refining the discrimination law into its present form, it would be disingenuous to argue that the application of the law is nothing more than a matter of common sense.*

App., *infra*, 17a-18a n.1 (Wilson, J., concurring; emphasis added). The witness credibility instruction is equally inadequate because it "merely allow[s] the jurors to disbelieve a particular witness. It [says] nothing about what the jury may do or infer once the jurors [have] decided to disbelieve the employer's proffered reason." *Ibid.*

C. Closing Argument is an Inadequate Substitute for a Pretext Instruction.

Like the majority, the concurrence did not believe the district court's refusal to give a pretext instruction prejudiced Conroy, primarily because Conroy's lawyer was allowed to argue pretext to the jury: "While arguments of counsel are an imperfect substitute for explicit instruction provided by the court, in this case, such arguments *mitigated* any harm that may have resulted from inadequate jury instruction." App., *infra*, 17a-18a (Wilson, J., concurring; emphasis added) (citing *Starr v. United States,* 153 U.S. 614, 626 (1894) ("[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest work or intimation is received with deference, and may prove controlling.")).

The Tenth Circuit has, however, expressly disagreed and held that a lawyer's closing argument is an inadequate substitute for a pretext instruction from a federal judge. *Townsend*, 294 F.3d at 1241; *see also id.* at 1246-47 (Brorby, J., dissenting) (noting "aggressive closing argument"). As that court explained: "It is unreasonable, we think, to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefit of such arguments." 294 F.3d at 1241.

A lawyer's closing argument is an especially ineffective substitute for a pretext instruction in an employment discrimination case, where judges instruct jurors on the business judgment rule. The jurors were accordingly told in this case that the law "requires only that an employer not discriminate against an employee because of the employee's age" and that "an employer may discharge, refuse to promote or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair." (Doc. 49 at 15).

A lawyer may discern that a business judgment instruction does not prohibit a juror from inferring discrimination from nothing more than an employer's false reason for an employment action. But given the employee's burden of proof, a juror will likely have a more difficult time understanding that the prohibition from considering "any other reason, good or bad, fair or unfair" as evidence of discrimination does not include dishonest reasons. *See generally* Dorothy Easley, *"Plain English" Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help*, 78 FLA. BAR. J. 66, 67-68 (October 2004) (discussing juror difficulty in comprehending instructions).

D. The Lack of a Pretext Instruction Prejudiced Conroy.

"When the correctness or adequacy of a jury instruction is at issue, an appellate court may not review the evidence in the light most favorable to the verdict winner. There can be no deference to a factual finding tainted by legal error. If the jury was misled as to the law on a material point, '[a court] cannot presume that the jury applied the appropriate standard in deciding [an issue].'" *Connecticut Mut. Life Ins. Co. v. Wyman*, 718 F.2d 63, 65 (CA3 1983) (quoting *McPhee v. Reichel,* 461 F.2d 947, 951 (CA3 1972), and citing *Hunziker v. Scheidemantle,* 543 F.2d 489, 497-98 (CA3 1976)); *see also Caballero v. City of Concord*, 956 F.2d 204, 207 (CA9 1992) ("In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.").

The concurrence nonetheless relied on two factual considerations to find that it was "probable that the jury chose to believe the reasons articulated by Abraham Chevrolet for Conroy's discharge" and that there was thus no prejudice: 1) Conroy's position was filled by a man older than Conroy; and 2) there was evidence that Conroy failed to meet Abraham Chevrolet's standards for commercial sales. Those considerations are neither accurate nor adequate to conclude that closing argument made up for the lack of a pretext instruction:

1) Conroy's position was indeed *eventually* filled by a man older than Conroy, but only after Abraham Chevrolet had indefinitely filled the position with a man younger

than Conroy. And Abraham Chevrolet replaced the younger man with the older man shortly after Conroy had complained to human resources that the company fired him because of his age. Doc. 66 at 94 (Conroy: I "told her the situation that I felt that I was being discriminated against because of my age").

2) The standards that Conroy's department did not meet were "simply benchmarks" given by GM to dealerships that bought and sold the manufacturer's cars. App., *infra*, 8a. While those benchmarks were available to Abraham Chevrolet's personnel and the decisionmaker who terminated Conroy was *aware* of them, the decisionmaker did not claim that he relied on them when he discharged Conroy. On the other hand, there was considerable evidence that Conroy had performed well. *See* Amicus Curiae Brief of the U.S. Equal Opportunity Commission, http://pacer.ca11.uscourts.gov/PCRPJ2OY.PDF, at pp. 6-9 (discussing Conroy's performance and the factual dispute over why he was discharged).

There is a factual presumption in favor of an appellant challenging jury instructions, *Dressler*, 143 F.3d at 781; *Caballero*, 956 F.2d at 207; *Wyman*, 718 F.2d at 65, and the court of appeals found that the pretext instruction Conroy requested "accurately states the law." Though it would be possible for a jury to believe the reasons Abraham Chevrolet articulated for Conroy's discharge, that possibility provides an inadequate defense of the instructions given. The court of appeals should have concluded that the failure to give a pretext instruction prejudiced Conroy.

IV. The Questions Presented are Important.

"An examination of circuit cases reveals that where a jury is informed that they are allowed to infer discriminatory animus based on pretext, they consistently find in favor of the plaintiff. Inversely, where they are not informed of the inference, they find for the defendant." Tom Devine, Jr., *The Critical Effect of the Pretext Jury Instruction*, 80 U. DEN. L. REV. 549 (2003). Pretext instructions (or their absence) thus have a significant impact in discrimination cases.

Given that impact, and the extraordinary division in the circuits, whether the district courts should give pretext instructions––and whether it is prejudicial not to give them––are questions that now need to be resolved by this Court. As one writer observed:

> The ever-increasing volume of employment discrimination cases on the federal docket and the split among the United States Courts of Appeals regarding jury instructions on pretext necessitate swift resolution of this issue by the Supreme Court. In *Hicks* and *Reeves*, the Court firmly established pretext as a question for the jury. *Now the time has come to establish a clear standard for instructing juries in employment discrimination litigation.*

William J. Vollmer, *Pretext in Employment Discrimination Litigation: Mandatory Instruction for Permissible Inferences*?, 61 WASH. & LEE L. REV. 407 (Winter 2004) (emphasis added); *see also* Ronald J. Allen and Craig R. Callen, *Teaching "Bloody Instruction": Civil Presumptions and the Lessons of Isomorphism*, 21 QUINNIPIAC L. REV. 933, 959 (2003) ("At one point, in *Reeves*, the confusion actually required the Supreme Court to take the trouble to

point out that evidence suggesting that an employer offered a false explanation in order to cover up discrimination could be used to support an inference of discrimination. Recently, *Townsend* has confirmed a split in the circuits that may require the Court to devote its time to an equally obvious point.")

The court of appeals' decision in this case has further aggravated the division in the circuits. The time has come for the Court to resolve whether district courts should tell jurors about pretext in discrimination cases and when the failure to do so is prejudicial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

CRAIG L. BERMAN
THE BERMAN LAW FIRM, P.A.
111 Second Avenue N.E.
Suite 810
St. Petersburg, Florida 33701
Telephone (727) 550-8989

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

Counsel for Petitioner

October 12, 2004

375 F.3d 1228

United States Court of Appeals,
Eleventh Circuit.

Glen J. CONROY, Plaintiff-Appellant,

v.

ABRAHAM CHEVROLET-TAMPA, INC., d.b.a.
Autoway Chevrolet, Defendant-Appellee.

No. 03-11405.

June 30, 2004.

Craig L. Berman, Berman Law Firm, P.A., Saint Petersburg, FL, Shannon McLin Carlyle, The Carlyle App. Law Firm, Lady Lake, FL, John G. Crabtree, John G. Crabtree, P.A., Key Biscayne, FL, for Plaintiff-Appellant.

John Richard Hamilton, Foley & Lardner, Orlando, FL, for Defendant-Appellee.

Susan Ruth Oxford, Washington, DC, for Amicus Curiae, U.S. EEO[C].

Appeal from the United States District Court for the Middle District of Florida.

Before WILSON and FAY, Circuit Judges, and MILLS*, District Judge.

FAY, Circuit Judge:

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

[1] Conroy's complaint also included an ERISA claim which was resolved before trial and is not an issue in this appeal.

The main thrust of this appeal involves the question of whether or not it is mandatory that district courts give a pretext instruction to the jury in employment discrimination cases. We decide that it is not and answer in the negative. The other issue raised deals with the admissibility of certain evidence and we find no abuse of discretion.

Glenn J. Conroy ("Conroy") appeals from a final judgment entered after a jury returned a verdict in favor of his former employer, Abraham Chevrolet-Tampa ("Abraham Chevrolet"). Conroy sued Abraham Chevrolet, alleging his former employer had discharged him because of his age and in retaliation for his refusal to terminate another older worker, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* In his appeal, Conroy first argues that the district court erred by admitting testimony regarding the results of a post-termination investigation. Conroy also contends the district court erred in refusing his request that the jury receive an instruction on "pretext" – that is, for the jury to be instructed it could infer discrimination if it disbelieved Abraham Chevrolet's explanation for firing Conroy. For the reasons set forth below, we find the district court did not commit reversible error and therefore affirm.

I.

Conroy, who was born in 1946, joined Abraham Chevrolet as a sales manager for its commercial fleet department in March 2000. William Bledsoe ("Bledsoe") became general manager of the dealership in October 2000 and remained until he was discharged in April 2001. Conroy alleged that during Bledsoe's time at the

dealership, Bledsoe frequently made "ageist" comments, referring to the staff in the commercial sales department as "geriatrics" and referring to older employees as "old-geezer," "old-fart," and "dead wood." Bledsoe admitted to making at least some of these comments, but he claimed they were slang expressions and that he did not realize they would offend some employees. Bledsoe also admitted to mentioning his desire to hire "younger and more aggressive people," but stated that he was speaking figuratively, and not literally.

When Bledsoe took over as general manager, he expressed concern to Conroy about the commercial department's poor performance. According to Conroy, Bledsoe asked him to fire another employee, Dick Weber, who was in his early 70's at the time. Bledsoe denied ever making this request, and instead contended that Conroy attempted to partially blame Weber for the department's substandard performance and even asked Bledsoe if he could fire Weber. Bledsoe claimed he responded by saying Conroy could fire Weber if that was indeed the reason for the department's low performance. To add further support to Bledsoe's contention that he never considered firing Weber, Abraham Chevrolet pointed out at trial that Weber was selling more vehicles than anyone else in the department, with 56 percent of the sales for the entire commercial fleet in 2000.

Bledsoe fired Conroy on January 15, 2001, telling Conroy he was doing a "good job" but that the company was going in a different direction. But when Conroy attempted to receive unemployment benefits, he discovered that Bledsoe's explanation for discharging Conroy was "unsatisfactory performance." Conroy contacted

Roberta Bonavia, the Human Resources Director of Abraham Chevrolet's parent company, Auto Nation, Inc, and objected to Bledsoe's representation that poor performance was the motivating factor behind his termination. After Bonavia investigated the matter, Bledsoe agreed to change the stated reason for Conroy's discharge to "other."

On March 19, 2001, Conroy filed a charge of discrimination with the EEOC. Conroy then initiated his complaint against Abraham Chevrolet in August 2001, alleging Bledsoe had terminated him due to his age and because of his refusal to fire Dick Weber, an older employee, in violation of ADEA.[1] The district court denied Abraham Chevrolet's motion for summary judgment and the case proceeded to trial.

At trial, Conroy called Bonavia to testify regarding her investigation of the circumstances surrounding Conroy's discharge. Bonavia stated that when Conroy spoke with her, he said he believed he was terminated because he refused to fire Dick Weber. Nevertheless, Bonavia testified that based on her investigation, she believed Bledsoe terminated Conroy for poor performance, and that he told Conroy otherwise to "soften the blow." Conroy then asked Bonavia questions directed at the thoroughness of her investigation, and she admitted to having only talked to one other employee to determine whether Bledsoe sought to have Dick Weber fired. On cross-examination, Abraham Chevrolet asked Bonavia if, when investigating Conroy's claims, she had looked into

[1] Conroy's complaint also included an ERISA claim which was resolved before trial and is not an issue in this appeal.

industry standards regarding the number of sales and amount of profits each sales associate should produce each month. Conroy immediately objected to this line of questioning, claiming that information acquired after termination was inadmissible. The district court, however, allowed the questioning, reasoning that Conroy had "opened the door" on direct examination with questions to Bonavia suggesting that she had not adequately investigated his claims. Bonavia then testified that although sales associates are supposed to sell about 12 to 15 cars per month and account for $20,000 in profit, Conroy's department never performed within this range. She then stated that it was not unusual for this kind of poor performance to result in termination.

During the jury charge conference, Conroy proposed a jury instruction on "pretext." This instruction would have informed the jury that it was permitted, but not required, to infer discrimination or retaliation if it disbelieved Abraham Chevrolet's explanation for terminating Conroy. The district court declined to give this instruction, stating that (1) the Eleventh Circuit pattern jury instructions "sufficiently incorporate the concept that the plaintiff wishes to get across to the jury," and (2) the Eleventh Circuit has directed that due to the strong likelihood of jury confusion, juries are not to be instructed on the legal framework used to resolve employment discrimination cases. Conroy's counsel, did, however, have the opportunity to argue pretext to the jury in closing statements. The jury was also

instructed on drawing inferences from the evidence,[2] weighing the credibility of witnesses,[3] and burden of

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[2] The jury instructions stated:

> [T]he law permits you to draw such reasonable inferences from the evidence that you feel are justified in the light of common experience . . .
>
> While you are free to draw inferences based on circumstantial evidence and are not limited solely to what you see or hear as the witnesses testify, remember that an inference is not a suspicion or a guess. It is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact that has been shown to exist. In other words, you are not limited to bald statements of the witnesses and may make deductions and reach conclusions which reason, common sense, and experience lead you to draw from facts that have been established by the evidence in the case, but you may not speculate or guess that such a fact exists. Remember also that while one or another of the lawyers may have asked you to draw inferences or reach conclusions from certain evidence, you may refuse to do so if those inferences or conclusions are not supported by the evidence or do not make sense to you.

[3] The instructions explained:

> In considering the testimony of the witnesses, for example, you are the sole judges of the credibility or "believability" of that testimony and the weight to be given to that testimony.
>
> In weighing the testimony of a witness, you should consider the witness' interest, if any, in the outcome of the case . . . You should also consider the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, believe or disbelieve all or any part of the testimony of any witness.
>
> Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit that testimony . . . In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy appears to result from honest disagreement, innocent error, or intentional falsehood.

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proof.[4]

The jury returned a verdict for Abraham Chevrolet on October 21, 2002. Conroy filed a timely motion for a new trial which the district court denied. The district court then entered final judgment in accordance with the verdict and Conroy now appeals.

II.

We first briefly address Conroy's contention that the district court committed reversible error in allowing Bonavia to testify about her post-termination investigation. We review the district court's evidentiary rulings for abuse of discretion, and will only reverse if an erroneous ruling resulted in "substantial prejudice." *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1305 (11th Cir.1999).

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* * *

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you may think it deserves.

[4] The jury charge stated:

In order to prevail on this claim, [Conroy] must prove, by a preponderance of the evidence, that [Conroy's] age was a substantial or motivating factor that prompted [Abraham Chevrolet] to terminate his employment.

* * *

On the other hand, it is not necessary for [Conroy] to prove age was the sole or exclusive reason for [Abraham Chevrolet's] decision. It is sufficient if [Conroy] proves age was a determining consideration that made a difference in [Abraham Chevrolet's] decision.

In applying this standard, we will affirm a district court's evidentiary ruling unless the district court has made a "clear error of judgment" or has applied an "incorrect legal standard." *Id.* at 1306.

Given this standard, we find no abuse of discretion by the district court. Although we agree with Conroy that "after-acquired evidence cannot be used as the basis for Defendants' employment decision," *see Chapman v. AI Transport,* 229 F.3d 1012, 1068 n. 101 (11th Cir.2000) (citing *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 359-60, 115 S.Ct. 879, 885, 130 L.Ed.2d 852 (1995)), we are not convinced that Bonavia's testimony regarding the monthly sales figures is considered "after-acquired." These were simply benchmarks that Bledsoe testified were available to him at the time he discharged Conroy. Nevertheless, even if Bonavia's testimony could be considered after-acquired, evidence which normally would be inadmissible is indeed admissible if the opposing party opens the door to that line of questioning. *See Shaps v. Provident Life & Acc. Ins. Co.,* 244 F.3d 876, 886 (11th Cir.2001) (finding that although it would normally be improper for a defendant to present evidence of a plaintiff's financial condition, the defendant's evidence was proper as a response to plaintiff's initial attempt to portray herself as financially dependent). Bonavia's investigation became an issue at the trial. Once it was introduced as such by Conroy it was subject to full interrogation. We agree with the district court that when Conroy's direct examination consisted of questions to suggest that Bonavia performed an inadequate investigation, Abraham Chevrolet was entitled to respond by inquiring into the full extent of the investigation.

III.

We now turn to Conroy's argument that the district court erred by not giving the jury a specific instruction on pretext. "We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969, 973 (11th Cir.2000). If, however, we find that the instructions accurately reflect the law, the district court has wide discretion as to the instructions' style and wording. *See Bogle v. McClure,* 332 F.3d 1347, 1356-57 (11th Cir.2003). When reviewing a district court's failure to give a requested instruction, even if the requested instruction correctly states the law, we will only reverse if (1) the contents of the requested instruction are not adequately covered by the jury charge and (2) the requesting party suffers prejudicial harm. *See Wood v. President & Tr. of Spring Hill Coll. in the City of Mobile,* 978 F.2d 1214, 1222 (11th Cir.1992).

We agree with Conroy that his proposed instruction on pretext accurately states the law – the jury's disbelief of an employer's stated reason for termination may be enough to infer intentional discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148-49, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). This Court, however, has previously held that a district court's failure to give this type of pretext instruction is not error. *See Palmer,* 208 F.3d at 975. Conroy nonetheless maintains *Palmer* is not applicable here because (1) *Palmer* was decided before the United States Supreme Court's decision in *Reeves*, and (2) the jury instructions in *Palmer* did contain a pretext instruction and so were different than those given by the district court here.

We reject Conroy's contention that *Reeves* requires a pretext instruction to be given to the jury in employment discrimination cases. *Reeves,* resolving a circuit split, held that a finding of pretext may itself be enough to infer discrimination: "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148, 120 S.Ct. 2097. The Supreme Court was dealing with the question of sufficiency of evidence and did not address in any way the necessity of a particular jury instruction. *Reeves* therefore did nothing to change the law in the Eleventh Circuit – both before and after *Reeves,* a jury has been permitted to infer discrimination if it disbelieves the employer's stated reasons for termination. The *Palmer* decision, though reaffirming this principle, nonetheless held that a specific pretext instruction is not necessary.

We do realize that some circuits, in the wake of *Reeves,* now require the district courts to include a pretext instruction in their jury charge.[5] For example, in *Ratliff v. City of Gainesville, Tex.*, the Fifth Circuit, relying on *Reeves,* held that the trial court erred when it refused to give the jury a permissive pretext instruction. 256 F.3d 355, 360-61 (5th Cir.2001). *See also Townsend v. Lumbermens Mut. Cas. Co.,* 294 F.3d 1232, 1241 (10th Cir.2002)

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[5] Even before *Reeves,* two other circuits began to require jury instructions on pretext in employment discrimination cases. *See Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 280 (3d Cir.1998); *Cabrera v. Jakabovitz,* 24 F.3d 372, 382 (2d Cir.1994). *But see Gehring v. Case Corp.,* 43 F.3d 340, 343 (7th Cir.1994) (holding pre-*Reeves* that a pretext instruction, which describes only a permissible inference, is not necessary).

("[A] trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may – but need not – infer that the employer's true motive was discriminatory."). The majority of one Fifth Circuit panel, however, in *Kanida v. Gulf Coast Med. Pers. LP*, recently expressed concern that *Ratliff* unnecessarily expanded the scope of *Reeves* and urged for *en banc* reconsideration of its holding in that case. 363 F.3d 568, 577 (5th Cir.2004) (holding that although the district court's refusal to give a pretext instruction was error under *Ratliff*, it was not *reversible* error). Moreover, other circuits have not interpreted *Reeves* to require a pretext instruction. *See Moore v. Robertson Fire Prot. Dist.,* 249 F.3d 786, 789-90 (8th Cir.2001) (in expressing doubt that it would ever be reversible error to deny a requested pretext instruction, the court found no error here when the instructions accurately stated the law and did not preclude the jury from finding pretext); *Fite v. Digital Equip. Corp.,* 232 F.3d 3, 7 (1st Cir.2000) (though the court found that plaintiff did not properly request a pretext instruction, it expressed doubt that a pretext instruction, while permitted, is compulsory). We agree with those circuits that have not held *Reeves* to govern the question of whether a pretext instruction is necessary, and therefore conclude that *Reeves* does not limit *Palmer* as binding precedent for this Court.

Conroy next argues that *Palmer* does not control here because in *Palmer,* the jury instructions approved by this Court actually contained an instruction on pretext. The jury charge in *Palmer* did explain that one way the plaintiff could prove discrimination was to show that the employer's stated reasons for its actions were not true. But the plaintiff in *Palmer* argued in addition that the jury

needed to be informed that it could find for the plaintiff without any other evidence of discrimination. *Palmer,* 208 F.3d at 973. This Court found no error in refusing to give this type of instruction. *Id.* at 975. Here, the district court declined Conroy's request to give an instruction specifically encompassing both ideas advocated by the plaintiff in *Palmer*: (1) that one way to prove discrimination is to show the employer's proffered explanation is not worthy of belief; and (2) that no additional evidence is necessary to prove discrimination. Conroy argues that because the instructions we approved in *Palmer* contained language similar to Conroy's first request, any language in *Palmer* indicating that this type of pretext instruction would be unnecessary is dicta. Though we do recognize that the instructions in *Palmer* were different than those given here, we believe this Court's opinion in *Palmer* clearly rejected the argument that a pretext instruction is required in employment discrimination cases.

Even if *Palmer* were not controlling here, we would still hold there was no error in failing to give Conroy's requested instruction. Conroy argues that the jury was misled to believe that it could not infer discrimination or retaliation from a finding of pretext due to the district court's charge to the jury that (1) it was Conroy's burden to prove discrimination and (2) the jury could not second guess Abraham Chevrolet's legitimate business decisions. We do not agree, however, that either of these instructions misled the jury. First, the instruction on burden of proof required Conroy to establish discrimination, but it did not limit the methods by which he could prove it. Second, although the business judgment instruction explained to the jury that it could not second guess Abraham Chevrolet's legitimate business motives, it did not require the

jury to believe that any of the legitimate reasons advanced by the employer were in fact the true motivations behind Conroy's discharge. Not only do we reject Conroy's assertion that these instructions inhibited the jury from inferring discrimination or retaliation based on a finding of pretext, but we consider them both to be standard jury instructions that accurately reflect the law in this Circuit.

Though we do acknowledge that Conroy's pretext instruction is also a correct statement of law, we can only reverse the district court's decision if (1) the contents of the requested instruction were not adequately covered by the jury charge and (2) Conroy suffered prejudicial harm. *See Wood,* 978 F.2d at 1222. The charge to the jury gave instructions on drawing inferences from the evidence and weighing the credibility of witnesses. This was sufficient to allow the jury to find discrimination or retaliation so long as they disbelieved Abraham Chevrolet's explanation for Conroy's termination. We also find it significant that Conroy's counsel made good use of his opportunity to argue pretext to the jury in closing statements:

> A claim has been made, there is no confession. Nobody ever confesses in a discrimination case. You're going to have [to] weigh the testimony and decide do you think age had something to do with it. And I would suggest to you that when the man who fires him or without any warning, any documented reports of anything going wrong and comes up here with inconsistent statements that you can read into, that inconsistency and make an inference that, perhaps, the reason that was given by them may not have been the real reason. That's going to be one of the jury instructions[,] that you can read into and understand what the evidence is, make reasonable inferences

> in terms of their explanation . . . You can certainly read into that. If there's an inconsistent reason, then the age maybe had something to do with it.

We therefore reject Conroy's contention that he was prejudiced by the district court's failure to give his requested instruction.[6] *Cf. Kanida,* 363 F.3d at 579 (finding that because the jury instructions properly stated the law and because the plaintiff was given the opportunity during closing statements to argue that the evidence showed pretext, the failure to give the requested pretext instruction was not reversible error); *Moore,* 249 F.3d at 790-91 (in expressing doubt as to whether it would ever be reversible error to decline to give pretext instruction, the court noted that the plaintiff had the opportunity during opening and closing statements to argue pretext to the jury); *Gehring,* 43 F.3d at 343 (in finding that a pretext instruction was not necessary, the court noted the plaintiff's lawyer did argue pretext to the jury). Accordingly, we find no reversible error and hold that the district courts, though permitted,[7] are not required to give the jury a specific instruction on pretext in employment discrimination cases.

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[6] Even those circuits that have since *Reeves* required a pretext instruction still subject a district court's failure to give this instruction to harmless error analysis. *See Kanida,* 363 F.3d at 578; *Townsend,* 294 F.3d at 1242.

[7] We do note that district courts are giving variations of pretext instructions, which of course are proper under both *Palmer* and *Reeves. See, e.g., Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189 (11th Cir. May 11, 2004)

IV.

For the reasons discussed above, the district court did not commit reversible error and we therefore AFFIRM.

AFFIRMED.

WILSON, Circuit Judge, concurring in result:

I agree with the result reached in today's opinion because I agree that Mr. Conroy was not prejudiced by the trial court's refusal to give his requested pretext instruction. I write separately because, unlike the majority, I am persuaded by decisions of other circuits that present strong reasons for *requiring* a pretext instruction. *See Townsend v. Lumbermens Mut. Cas. Co.,* 294 F.3d 1232, 1241 (10th Cir.2002); *Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 280 (3d Cir.1998); *Cabrera v. Jakabovitz,* 24 F.3d 372, 382 (2d Cir.1994).

The Supreme Court has twice felt it necessary to clarify the confusion among the differing approaches to pretext analysis in discrimination cases. *See Kline v. Tenn. Valley Auth.,* 128 F.3d 337, 343 (6th Cir.1997) (discussing three distinct approaches to proving pretext). In *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Court said, "The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . . " *Id.* at 511, 113 S.Ct. 2742 (footnote omitted). In *Hicks,* the Court flatly rejected the so-called "pretext-plus" approach to discrimination analysis, which had required the plaintiff not only to demonstrate that the employer's

asserted reasons were pretextual, but also to introduce additional evidence of discrimination. *See id; see also Kline,* 128 F.3d at 343-44 (discussing effect of *Hicks* on circuit split).

Despite the Court's holding in *Hicks,* federal courts did not abandon the "pretext-plus" theory. In *Reeves v. Sanderson Plumbing Prods., Inc.,* 197 F.3d 688 (5th Cir.1999) (per curiam), the Fifth Circuit reversed a jury verdict in favor of plaintiff-employee because employee failed to present sufficient additional evidence that the employer acted out of discriminatory animus. The Supreme Court reversed, explaining that *Hicks* forbade summary judgment for a defendant where the plaintiff, after satisfying the requirements of a prima facie case, presented evidence that the defendant's proffered explanation was pretextual. *See Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 146-49, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

As these cases demonstrate, this has been a difficult matter for courts, a likely indication that it will also be difficult for jurors. The majority correctly notes that this Circuit, both before and after *Reeves,* permitted a jury to infer discrimination if it disbelieved the employer's stated reasons for termination. However, I consider the danger great that a jury might make the same mistake that many courts continued to make even after *Hicks.* Jurors are likely to be confused where, as here, the law the jury should have been instructed on has proven too difficult even for federal courts to discern without repeated guidance from the Supreme Court. Thus, in my view, if a party requests an instruction on pretext, the district court must give one.

I agree with the majority that failure to give a requested pretext instruction warrants reversal only if such failure prejudicially harms the requesting party. *See Wood v. President & Tr. of Spring Hill Coll. in the City of Mobile,* 978 F.2d 1214, 1222 (11th Cir.1992).

In this case, the district court ensured that the jury adequately understood the complex issues involved. Specifically, the district court permitted counsel to argue the substantive law of *Reeves* and *Hicks* in arguments before the jury.[1] While arguments of counsel are an

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[1] The majority opinion also reasons that the district court's charge to the jury, including instructions on burden of proof, credibility of witnesses and reasonable inferences drawn from introduced evidence, also ensured that the jury adequately understood the law. I am not persuaded that these instructions were sufficient to inform the jury that it could infer discrimination if it disbelieved the employer's stated reasons for termination.

The district court instructed that Mr. Conroy must prove by a preponderance of the evidence that the defendant intentionally discriminated against him on the basis of his age. A rational juror might very well interpret such an instruction to require affirmative proof of discriminatory intent. In other words, in Mr. Conroy's case, a rational juror might have concluded that, while Mr. Conroy successfully demonstrated that Abraham Chevrolet's proffered reason for discharging him was pretextual, Mr. Conroy could not prevail for having failed to offer any credible evidence directly suggesting a discriminatory animus. Combined with the district court's instruction on business judgment, which explained to the jury that it could not second guess Abraham Chevrolet's legitimate business motives, it is not difficult to see how a jury might have been dissuaded from finding discrimination even if it disbelieved Abraham Chevrolet's proffered reasons for discharge.

The district court also instructed the jury on reasonable inferences jurors are entitled to make based upon common sense. However, such an instruction does not mean that the jury will know without being told that its disbelief in the employer's proffered reason may be evidence that will support a finding of intentional discrimination. In light of the amount of case law dedicated to shaping and refining the discrimination law into

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imperfect substitute for explicit instruction provided by the court, *see Starr v. United States,* 153 U.S. 614, 626, 14 S.Ct. 919, 38 L.Ed. 841 (1894) ("[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest work or intimation is received with deference, and may prove controlling."), in this case, such arguments mitigated any harm that may have resulted from inadequate jury instruction.

Moreover, the uncontroverted evidence at trial was that Mr. Conroy's position was filled by a man older than Mr. Conroy. The evidence also demonstrated that Mr. Conroy failed to meet Abraham Chevrolet's standards for commercial sales. In light of this evidence, it is probable that the jury chose to believe the reasons articulated by Abraham Chevrolet for Mr. Conroy's discharge. Thus, while I believe that the district court erred in refusing to give the requested pretext instruction, there was no prejudicial harm *in this case.*

Providing the jurors clarification on a point of law that has eluded federal courts until quite recently is more than appropriate. It should be *required.* Where requested, I believe it is error to refuse to give a pretext instruction.

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its present form, it would be disingenuous to argue that the application of the law is nothing more than a matter of common sense.

Finally, the district court instructed the jury that it could discredit a witness's testimony if it found the testimony inconsistent or unbelievable. This instruction, however, merely allowed the juror to disbelieve a particular witness. It said nothing about what the jury may do or infer once the jurors had decided to disbelieve the employer's proffered reason.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GLENN J. CONROY, Plaintiff, v. ABRAHAM CHEVROLET-TAMPA, INC., d/b/a AUTOWAY CHEVROLET, Defendant.	Hon. Joseph H. Rodriguez Case No. 8:01-CV-1466-T-27MAP ORDER (Filed Feb. 13, 2004)

This matter is before the Court on Plaintiff's motion for a new trial pursuant to Federal Rule of Civil Procedure 59. The Court has considered the written submissions of counsel, and has determined that Plaintiff's motion should be denied.

Plaintiff alleged that he was discriminated against on the basis of age (or in retaliation for refusing to discriminate against another employee on the basis of age) when he was terminated from his employment with the Defendant company. His case was tried before a jury, and on October 21, 2002, the jurors returned a verdict of no cause of action. Plaintiff now seeks a new trial, contending that the Court's charge to the jury was erroneous in that the Court did not instruct the jury that a finding of pretext can support an inference of discriminatory or retaliatory intent, and contending that "the defense introduced testimony contrary to that of its own decision-maker with after-acquired evidence of performance standards never adopted by Defendant itself." (Pl.'s Mem. of Law in Supp. of Mot. for New Trial, p. 3.)

Plaintiff's Argument

Plaintiff argues that testimony was presented that Plaintiff performed favorably for the Defendant company during the months of November and December of 2000, but he was terminated on January 15, 2001, approximately two weeks after receiving and refusing to follow an order to fire an older salesman. Plaintiff has stated that he and another individual testified at trial[1] that Plaintiff's supervisor did not express dissatisfaction with Plaintiff's performance during his termination meeting, yet Defendant listed that Plaintiff was terminated for unsatisfactory performance on Plaintiff's unemployment compensation claim form. Plaintiff states that at some later point, his supervisor and Defendant's corporate representative "agreed" that Plaintiff was discharged for reasons other than unsatisfactory performance.

Nonetheless, Plaintiff argues, Defendant's corporate representative was permitted to testify that Plaintiff and his staff should have been selling fifteen to eighteen commercial vehicles per month, "based on an inquiry she undertook *after* Plaintiff filed a charge of discrimination." (Pl.'s Mem. of Law in Supp. of Mot. for New Trial, p. 4.) Plaintiff characterizes this as "after acquired evidence [which] attempted to paint Plaintiff as incompetent" after Plaintiff's supervisor had expressed satisfaction with Plaintiff in the two months leading up to his termination. (*Id.*) Plaintiff argues that "the defense attempted to make

[1] The Court notes that Plaintiff neither quoted nor cited to the trial transcript for any of his arguments based on testimony presented at trial. Rather, counsel seems to have constructed all of the arguments presented based on his recollection of what was said in court.

[the Defendant's corporate representative] the decision-maker by eliciting standards of performance of which [Plaintiff's supervisor] was never aware or had articulated." (*Id.* at p. 5.) This is alleged to have confused the jury.

At trial, Plaintiff advanced two theories. First, he contended he was fired because of his own age. Second, he contended he was fired because he refused to terminate Dick Weber, an employee who was over seventy at the time. The uncontroverted evidence presented at trial was that the Plaintiff was replaced on a permanent basis by a man who was one year older (Randy Clark), and Dick Weber, age 70, is still employed at the dealership. Other trial evidence also undercut Plaintiff's allegations.

Plaintiff testified that the manufacturer standard for commercial sales is twelve vehicles per month. He also testified that he never sold twelve vehicles in any month, much less averaging twelve vehicles in the ten months he worked for Defendant. Additionally, others in his department sold an average of three or four vehicles per month and were not selling at acceptable profit levels. Plaintiff's contention that he was not responsible for his performance and that he needed eighteen months to "get up to speed" was obviously rejected by the jury. The only person who was selling cars and generating profit for the dealership was Weber, age 70, who continues to work there.

Plaintiff also has alleged that the jury was improperly instructed on the claim of age discrimination. Plaintiff contends that "ageist" comments, such as "old geezer," "old fart," "younger and more energetic," and "fresh blood," made by the Plaintiff's supervisor would have supported judgment for the Plaintiff. (Pl.'s Mem. of Law in Supp. of

Mot. for New Trial, p. 5.) Plaintiff complains, however, that the Court did not charge the jury using Plaintiff's requested Instruction No. 10 on pretext:

> In determining whether the Plaintiff has proved to your satisfaction that the alleged discrimination or retaliation was a determining factor that made a difference in the employer's decision, you may consider whether the employer's explanation for the discharge is a pretext as defined below.
>
> A plaintiff may attempt to prove pretext directly by persuading you that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Disbelief of the defendant's explanation may be enough to infer discrimination or retaliation.
>
> A plaintiff may therefore show pretext with evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge.

The Plaintiff further complains that the Court gave the jury a pattern instruction, even though the Plaintiff requested that this instruction be given. The Plaintiff's argument is that this Court did not provide the jury with the proper guidance on how to reach an inference of discrimination or retaliation. At issue are the following sentences:

> To summarize, it is the burden of the Plaintiff to prove to your satisfaction by a preponderance of the evidence that the Defendant

discriminated against the Plaintiff because of Plaintiff's age.

* * *

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's age. So far as you are concerned in this case, an employer may discharge, refuse to promote or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

* * *

For an adverse employment action to be "causally related" to statutorily protected activities it must be shown that . . . the protected activity was a substantial, motivating cause that made a difference in the Defendant's decision.

Plaintiff rests his argument that an instruction on pretext was essential in this case upon the contention that the Defendant's agents were not credible witnesses.

Discussion

Motions for new trials are generally governed by Federal Rule of Civil Procedure 59(a), which provides in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues in an

> action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Fed. R. Civ. P. 59(a). Granting a motion for a new trial under Federal Rule of Civil Procedure 59 is within the discretion of the trial court. *See United States Equal Employment Opportunity Comm'n v. W & O, Inc.*, 213 F.3d 600, 610 (11th Cir. 2000).

A new trial may be granted when the jury's verdict is against the great weight of the evidence. *Carter v. Decision-One Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997). However, the district court must not second guess the jury and may not simply substitute its judgment for that of the jury if the verdict is supported by sufficient evidence. *Lambert v. Fulton County*, 253 F.3d 588, 594 (11th Cir. 2001). Thus, "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great not merely the greater weight of the evidence." *Conway v. Chemical Leamon Tank Lines*, 610 F.2d 360, 362-63 (5th Cir. 1980).

A new trial may also be grounded on the claim that there were substantial errors in the instructions given to the jury. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). A district court, however, is given broad discretion in formulating jury instructions. *Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406, 1415 (11th Cir. 1997); *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1190 (11th Cir. 1995). The Court may grant a new trial where jury instructions do not accurately reflect the law, and where the charge, as a whole, does not correctly instruct the jury. *Broaddus v. Florida Power Corp.*, 145 F.3d 1283, 1288 (11th Cir. 1998). On the other hand,

the Court should only grant a motion for a new trial based on improper jury instructions if the Court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* (citations omitted).

A. "After-Acquired Evidence"

Plaintiff's counsel's contention that testimony elicited from Defendant's corporate representative, Bobbie Bonavia, was inappropriate after-acquired evidence is misplaced. Initially, Plaintiff's supervisor and the alleged discriminator, Bill Bledsoe, testified that he was aware of manufacturer benchmarks. Additionally, Kelly Greene testified that Bledsoe had made several comments regarding the poor performance turned in by Plaintiff's department. It is also uncontroverted that Bledsoe was made aware of the statistical data concerning Plaintiff's department's performance at the time when Bledsoe was making the determination to relieve Plaintiff of his employment responsibilities.

Plaintiff's counsel argues that Defendant inappropriately interjected after-acquired evidence into the trial. Initially, Plaintiff's lawyer asked Bonavia several questions about her investigation following Plaintiff's report (after termination) that he thought age played a role in his situation. Plaintiff's counsel raised issues regarding the sufficiency of Bonavia's investigation, the witnesses she interviewed, and otherwise questioned her role in the analytic process following Plaintiff's termination and subsequent report of age discrimination. As a result, Plaintiff's counsel opened the door for questions concerning Bonavia's investigation, the standards used to evaluate

Plaintiff, and the other items about which the Plaintiff complains.

Plaintiff's counsel also contends that Bledsoe lied to Plaintiff during the termination hearing. (Pl.'s Brief, p. 20.) At trial, Bledsoe testified that he told Plaintiff during the termination meeting that they were taking the dealership in another direction. Part of his motivation for not telling the Plaintiff that he had done a poor job was to spare his feelings. Additionally, Bonavia testified that the company changed the reason Plaintiff was terminated to "other" on an internal document out of a courtesy to Plaintiff, and in order not to affect his unemployment status. Plaintiff was not denied unemployment compensation benefits. Plaintiff's contention that he did not know his performance was substandard was obviously not accepted by the jury. The contention that "other" meant "because of age" was not supported by the evidence.

There was evidence from which a jury could find that Plaintiff had been in the automotive business for several years, that he last worked in a Commercial/Fleet Department in Autoway Chevrolet of Clearwater, and was aware of how many cars he was selling on a monthly basis and the profits generated on those vehicles. He also knew the sale activity of the other sales associates in his department. Defense counsel also asserts that Plaintiff's counsel was made aware of Plaintiff's performance when documents were produced in February of 2002, approximately eight months before trial. The contention that the information was a surprise is not supported by the evidence.

There has been no manifest injustice in this case. Plaintiff has not supported his argument of "after-acquired evidence" with the record of this case. At the time Plaintiff

was terminated, the Defendant had statistics on the number of commercial vehicles sold by Plaintiff and his group. The fact that Plaintiff was terminated for substandard performance was documented at the time of his termination in Defendant's answer to Plaintiff's unemployment compensation application, before Plaintiff ever charged Defendant with discrimination. Moreover, there was ample evidence presented at trial to support the jury's verdict that the Defendant was not liable to Plaintiff because the Plaintiff was terminated for a reason other than age discrimination. Plaintiff simply did not meet his burden of showing that discriminatory animus was a determinative factor in the decision to terminate him, either directly or indirectly.

B. Jury Instructions

In addition, the instructions given to the jury accurately reflected the law of the Eleventh Circuit. The Court was guided by the Circuit's decision that it is not reversible error to refuse to give a plaintiff's requested pretext instruction. *Palmer v. Board of Regents of the Univ. Sys. of Georgia,* 208 F.3d 969 (11th Cir. 2000). The Eleventh Circuit has explained, "it is inappropriate to instruct the jury with phrases like 'prima facie case' and 'burden of production' because they create a distinct risk of confusing the jury." *Id.* at 974 (citation omitted). The Circuit found that the pattern jury instructions convey the law correctly, although the court suggested that the Committee on Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit could revisit the pattern

instruction at issue here to determine whether the instruction could be clarified. *Id.* at 975.[2]

Other circuits also have held that, while a proposed pretext instruction may be a correct statement of the law, it need not be given in every discrimination case. "[A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory inference. . . . Rather than describing each, the judge may and usually should leave the subject to the argument of counsel." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). *Accord Moore v. Robertson Fire Prot.* Dist., 249 F.3d 786, 790 (8th Cir. 2001); *Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000). *But see Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998); *Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994) (all calling for pretext instructions where a rational finder of fact could reasonably find false the defendant's explanation for adverse employment action and could infer pretext from the falsity).

---

[2] Prior to the *Palmer* decision, in a similar vein, the Eleventh Circuit cautioned, "we clearly have directed that juries *not* be instructed on the *McDonnell Douglas* framework" under which a plaintiff must first establish a prima facie case of discrimination, then the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the challenged employment decision, and finally the plaintiff then bears the ultimate burden of persuasion that the defendant's proffered reason is pretext for discrimination. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1333 (11th Cir. 1999) (citing *Cabrera v. Jakabovitz*, 24 F.3d 372, 381 (2d Cir. 1994); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992)).

The parties in this case were free to argue to the jury, and the Plaintiff's counsel was not prohibited from arguing that the reason given for Plaintiff's termination was a pretext for age discrimination. Plaintiff's counsel clearly argued that the defense case was not credible. The jury, obviously, decided the credibility questions in Defendant's favor.

Conclusion

For the foregoing reasons,

IT IS ORDERED on this 13th day of February, 2003 that Plaintiff's motion for a new trial is hereby DENIED.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

(3)

No. 04-0505

Supreme Court, U.S.
FILED
NOV 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GLENN J. CONROY,

Petitioner,

v.

ABRAHAM CHEVROLET-TAMPA, INC.,
d/b/a AUTOWAY CHEVROLET,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. HAMILTON
Counsel of Record

FOLEY & LARDNER LLP
111 North Orange Avenue
Suite 1800
Orlando, Florida 32801
Telephone: (407) 423-7656

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

In an action for unlawful age discrimination, whether it constitutes automatic reversible error for a trial court to refuse to give a plaintiff's requested "pretext" instruction to the jury, when the jury instructions actually given accurately and adequately explained the law, the plaintiff's counsel is allowed to argue pretext to the jury, and there is no reasonable chance that the jury was misled in its deliberations.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Parties to Lawsuit

Abraham Chevrolet-Tampa, Inc.

Glenn J. Conroy

Other Interested Persons and Corporate Disclosure Statement

Auto Holding Corp.

AutoNation Enterprises, Inc.

AutoNation, Inc.

Craig L. Berman, Esq.

Berman Law Firm, P.A.

The Carlyle Appellate Law Firm

Shannon McLin Carlyle, Esq.

Colonial Imports, Inc.

Colonial Imports, Ltd.

John G. Crabtree, Esq.

Lorraine C. Davis, Esq.

Equal Employment Opportunity Commission

First Team Automotive Corp.

First Team Management, Inc.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

The Florida Appellate Alliance, P.L.C.

Foley & Lardner

Foley & Lardner LLP

John R. Hamilton, Esq.

John G. Crabtree, P.A.

Bradley R. Johnson, Esq.

James L. Lee

Susan R. Oxford, Esq.

The Hon. Joseph H. Rodriguez

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JURISDICTION

The respondent, Abraham Chevrolet-Tampa, Inc., d/b/a Autoway Chevrolet ("Abraham Chevrolet"), agrees with the jurisdictional statement contained in the petition filed by the petitioner, Glenn J. Conroy ("Conroy"). The district court's final judgment was entered on October 21, 2002. R:52.[1] On October 24, 2002, Conroy filed a timely motion for a new trial under rule 59 of the Federal Rules of Civil Procedure. R:53. The district court denied that motion through an order entered on February 13, 2003. AP:19a-29a; R:59. Conroy appealed to the United States Court of Appeals for the Eleventh Circuit through a timely notice of appeal filed on March 14, 2003. R:60.

The court of appeals's decision issued on June 30, 2004. *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004); AP:1a. Conroy filed no post-decision motions. Because this Court granted Conroy a two-week enlargement of time to file his petition for certiorari, Conroy's petition to this Court was timely under rule 13 of this Court's rules, and the Court otherwise has jurisdiction over this case pursuant to 28 U.S.C. Section 1254(1).

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[1] The record on appeal is cited as "R:___," according to docket number. When appropriate, specific page numbers are given as well. Thus, for example, the citation "R:66:54" would refer to page 54 of the transcript docketed as item 66. Conroy's petition is cited as P:___, according to page number. The appendix to Conroy's petition, setting forth the opinion of the court of appeals and the district court's order denying Conroy's motion for a new trial, is cited as AP:___, according to page number.

STATEMENT OF THE CASE

A. Conroy's Employment and Termination

Conroy, the plaintiff in the district court, prosecuted two claims against Abraham Chevrolet, Conroy's former employer. First, he contended that he was fired because of his age. Second, he alleged that he was fired in retaliation for his refusal to fire an older salesperson, Dick Weber. R:1:3-5. Conroy attributed the alleged wrongful acts to William Bledsoe, the former general manager of the Abraham Chevrolet dealership.[2] *See, e.g.*, R:66:54; AP:2a-3a.

Conroy, who was born in 1946, began working in the commercial (or "fleet") department of Abraham Chevrolet in March 2000. R:66:37, 135; AP:2a. Bledsoe became general manager of the dealership – both the commercial department and the retail department – in October or November of 2000. R:66:130-31; AP:2a.

Several witnesses questioned Bledsoe's qualifications and competence to act as general manager for the dealership. R:65:68, 93, 95-96; R:66:30. According to some former employees of Abraham Chevrolet, Bledsoe also allegedly made comments that apparently led some people to believe that he favored younger workers. R:65:24, 28-28, 51-56, 128-30; R:66:14-15, 29, 38-39, 40, 128; AP:3a. At least one of those former employees intended to file his own lawsuit against Abraham Chevrolet. R:66:24. Another of them currently works with Conroy. R:65:86.

---

[2] Conroy's complaint also included an ERISA claim. R:1:5. The district court ruled that Conroy was not entitled to a jury trial on that claim. R:24:8-9. Conroy apparently abandoned that claim at some unspecified point thereafter. AP:4a n.1.

Others who worked with Bledsoe at Abraham Chevrolet, however, disputed that Bledsoe made age-insensitive comments, saying that they had never heard Bledsoe make so-called "ageist" remarks. R:65:154; R:67:82. Bledsoe himself testified that he was speaking figuratively, not literally, when he spoke of a desire for younger, more aggressive sales people. R:66:127-28, 165-66. Moreover, he completely denied making some of the age-insensitive remarks that were attributed to him by disgruntled former employees.[3] R:66:177-79.

During the relevant time frame, the employees of Abraham Chevrolet were almost evenly split between those under 40 (49 percent) and those over 40 (51 percent). R:67:47. While Bledsoe was general manager, approximately ten percent of each group was fired. R:67:47-48. Nonetheless, while he was there, Bledsoe increased the pay of all of those in the commercial department (except Conroy), including the older salespersons. R:66:65-66.

The commercial department was "grossly underperforming" and falling short on established benchmarks. R:66:197, 218. During the operative period of time, the dealership was ranked fifth out of eight. R:66:67. Bledsoe thus had several conversations with Conroy about the failure of the commercial department to perform up to expectations. R:66:196, 200; AP:3a. Bledsoe likewise

---

[3] The statement of Bledsoe quoted in Conroy's petition (P:2 n.2) – which Conroy uses in an attempt to show Bledsoe's alleged preference for younger workers – actually came from Bledsoe's deposition. That statement was not introduced as substantive evidence at trial; rather, it was merely used in an attempt to impeach Bledsoe through an alleged prior inconsistent statement. R:66:133. The parties agreed to a jury instruction telling the jury not to consider such impeachment as substantive evidence. R:67:179-80; R:49:13.

expressed to Abraham Chevrolet's controller concerns about the deficient performance of the commercial department. R:67:113, 116-17, 120-21.

According to Bledsoe, Conroy tried to blame Weber, in part, for the department's substandard performance, and Conroy even asked for permission to fire Weber, who was in his early 70s at the time. R:66:196, 217; AP:3a. Weber and Conroy did not get along. R:67:66-67. Bledsoe responded to Conroy's request by stating that Conroy could "get rid" of Weber if Weber was indeed the reason for the commercial department's poor performance. R:66:216; AP:3a.

Conroy, however, testified that Bledsoe asked him to fire Weber, stating that Bledsoe referred to Weber at that time as "the old geezer." R:66:41-42, 52; AP:3a. Bledsoe had allegedly used that description in reference to Weber at other times as well. R:65:58, 129-30. Bledsoe stated that he used that phrase and others (such as "old fart") merely as "expressions" or as "slang." R:66:129-30, 164-65. And, in fact, Weber "fairly frequently" referred to himself in a self-deprecating way on the subject of his age. R:65:114. He testified that he would not be offended by being called "an old geezer." R:67:69-70.

Conroy's testimony that he was instructed to fire Weber was called into serious doubt. *See, e.g.*, R:66:59-63. Bledsoe denied that he ever gave such an instruction to Conroy. R:66:128, 134, 215; AP:3a. Bledsoe also denied ever referring to Weber as "dead wood." R:66:176. Instead, when Bledsoe used that expression, he was referring to unproductive employees in general, but not any employees in particular. R:66:176-77. Similarly, Weber himself

testified that Conroy never told him of Bledsoe's alleged desire to get rid of him. R:67:66.

Indeed, it would have been most foolish for Bledsoe to give such an order, for Weber was selling more vehicles that everyone else at the dealership combined. R:66:77; AP:3a. He had 56 percent of the sales for the entire commercial fleet in 2000. R:67:67-68; AP:3a. Weber consistently achieved his success even though he is "physically impaired," with some difficulty walking at a brisk pace. R:66:134, 195.

In fact, Weber was the only salesperson in the commercial department whose job performance was not below standard. R:66:201. He was the only one who averaged sales of 12 or more vehicles per month. R:66:125-26. Indeed, the best salespersons at Abraham Chevrolet was over the age of 40, averaging 52-53 years old. R:67:42. Nonetheless, except for Weber, all of the commercial sales people, including Conroy, were too complacent, in Bledsoe's view. R:66:204.

When Conroy was fired, Weber had no fear that his employment would also be terminated. R:67:69. In fact, close to the time that Conroy's employment was terminated, Weber was promoted and received a pay increase. R:66:49. Weber's promotion and pay increase occurred well before Conroy threatened to file suit or began alleging that he had been the victim of age discrimination. R:67:29.

Weber continues to work at Abraham Chevrolet. R:66:63; R:67:65. In fact, of the salespersons employed in the commercial department at the time Conroy was employed by Abraham Chevrolet, Weber is the only one who was still employed by Abraham Chevrolet at the time of trial. R:66:125-26. Weber was 75 years old at the time

he testified at trial. R:67:65. Conroy was 55 at the time of trial. R:66:39.

Conroy also admitted that he did not contact anyone within the Human Resources Department (either of Abraham Chevrolet or of Abraham Chevrolet's parent company) regarding the alleged order to fire Weber, even though Conroy knew that remedy was available to him. R:66:93-94; R:67:125-26. Indeed, prior to his termination, Conroy never made any complaints to that department at all. R:67:43, 125.

Conroy was fired on January 15, 2001. R:66:153; AP:3a. At the time Conroy's employment was terminated, Bledsoe intended to eliminate, or at least reduce, the commercial department and increase the retail component of the dealership. R:65:91-92, 130; R:66:98-99; R:67:20, 122. When firing Conroy, Bledsoe thus told him that he was being let go because Bledsoe wanted to go in a "different direction." R:65:62; R:66:47; AP:3a. However, because the employment of Bledsoe himself was terminated shortly thereafter, on April 7, 2001, the contemplated changes to the commercial department never occurred. R:65:63; R:66:90, 189.

Following his termination, Conroy sought unemployment compensation and, in doing so, he discovered that Bledsoe's stated reason for terminating Conroy's employment was because of "unsatisfactory performance." R:66:47-48, 158; AP:3a. At that point, Conroy contacted Roberta Bonavia, the Human Resources Director of Abraham Chevrolet's parent company. R:67:4, 9; AP:3a-4a. Conroy did not initially allege at that time, however, that he had been fired because of his age. R:66:95; R:67:7-8. Instead, Conroy conveyed to Bonavia his alleged belief

that he was terminated for refusing to fire Weber. R:67:7-8.

Bonavia investigated Conroy's allegations. R:67:5; AP:4a. As part of that process, she sought and obtained facts and figures regarding Conroy's job performance. R:67:33. Although Bledsoe had told Conroy, at the time of Conroy's termination, that Conroy had done a "good job," Bonavia concluded that Bledsoe had been trying to be kind to Conroy – and spare his feelings – by not telling him that he was being fired for poor performance. R:66:47; R:67:9-10, 46; AP:4a. Bonavia's experience was that managers commonly avoided telling employees that they were fired because of poor work. R:67:9-10, 46.

Bledsoe emphatically denied that Conroy was fired either because of his age or because he refused to fire Weber. R:66:189. Consistent with Bledsoe's denial, at the conclusion of her investigation, Bonavia "found nothing to substantiate [Conroy's] claims." R:67:82. Instead, Bonavia concluded that Conroy's unsatisfactory performance was the true reason for terminating his employment. R:67:18. Nevertheless, during a conversation with Bonavia, Bledsoe agreed to change the reason for Conroy's termination from "unsatisfactory performance" to "other." to enable Conroy to obtain unemployment compensation. R:66:158; R:67:18; AP:4a.

Conroy's job performance was unquestionably deficient – a fact that Bledsoe had discussed with Abraham Chevrolet's controller prior to terminating Conroy. R:67:122. For example, each salesperson should average sales of 12 and 15

vehicles each month,[4] resulting in approximately $20,000 in gross profits per salesperson per month. R:67:38-39; AP:5a. Bledsoe's sales were never close to that amount, and he never had a month in which he sold even 12 vehicles. R:66:73-76, 102, 109-10. His performance was therefore never even in the bottom range of acceptable performance. R:67:39-42; AP:5a. In fact, his sales were more than 50 percent below expected performance – and termination of employment at Abraham Chevrolet is very common for salespersons who have such bad numbers. R:67:43; AP:5a.

Conroy was initially replaced by Joel Early, who was 44 years old at the time. R:65:62-63, 127-28, 147; R:66:57. That promotion was intended to be merely temporary. R:66:154. And, in fact, Early was shortly thereafter replaced by Randy Clark, who is two years older than Conroy. R:66:60, 183, 199. Despite the implication in Conroy's petition that Clark was not hired until after Conroy began complaining "that the company fired him because of his age" (P:17), it was in fact undisputed that Clark was hired to fill Conroy's former position before Abraham Chevrolet learned that Conroy had filed a charge of discrimination with the EEOC. R:66:172-73; R:67:29-30.

B. The Charge Conference, Verdict, and Judgment

At the charge conference near the conclusion of the trial, Conroy requested a specific instruction regarding his assertion that Abraham Chevrolet's stated reason for terminating his employment was a mere pretext. R:67:55-58, 168;

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[4] Another witness, Conroy himself, identified the benchmark as between eight and 12 vehicles per month. R:66:101-02.

AP:5a. The requested instruction, Plaintiff's Proposed Jury Instruction No. 10, labeled as a "Pretext Instruction," reads as follows:

> In determining whether the Plaintiff has proved to your satisfaction that the alleged discrimination or retaliation was a determining factor that made a difference in the employer's decision, you may consider whether the employer's explanation for the discharge is a pretext as defined below.
>
> A plaintiff may attempt to prove pretext directly by persuading you that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Disbelief of the defendant's explanation may be enough to infer discrimination or retaliation.
>
> A plaintiff may therefore show pretext with evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge.

R:35 at 16.

The district court denied the requested instruction, stating:

> In instructing the jury the court also will denied [sic] plaintiff's request to include an instruction on pretext. The pattern jury instructions for the 11th Circuit sufficiently incorporate the concept that the plaintiff wishes to get across to the jury. In addition, the Circuit has directed that juries

> really should not be instructed on the McDonnell Douglas[5] framework due to the strong likelihood of jury confusion over the individual components of the burdens shifting analysis. And there we can see Farley versus Nationwide Mutual Insurance Company, 197 F.3rd, 1322, at page 1333, which is the 11th Circuit, 1999 authority.

R:67:169.

The actual jury instructions that the district court gave included the following:

> Under federal law, it is unlawful for an employer to discharge or lay off or otherwise discriminate against any employee because of that employee's age. When the employee is at least 40 years of age.
>
> In order to prevail on this claim, the plaintiff must prove by a preponderance of the evidence that plaintiff's age was a substantial or motivating factor that prompted the defendant to terminate his employment.
>
> . . .
>
> [I]t is not necessary for the plaintiff to prove age was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves age was a determining consideration that made a difference in the defendant's decision.

R:67:181-83; R:49:15-16; AP:7a n.4. The instructions also included standard instructions on the credibility of witnesses, logical inferences from the evidence, and the

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

consequences of finding testimony to be false. R:67:176-80; AP:6a-7a n.3.

Despite the absence of a formal pretext instruction, Conroy's counsel, during closing argument, was free to argue – and did in fact argue – that the jury could, and should, find for Conroy if the jury rejected the truth of Abraham Chevrolet's stated reason for terminating Conroy's employment. For example, the closing argument of Conroy's counsel included the following:

> Now, you all listened to Mr. Bledsoe. And you'll have to decide did he have a nondiscriminatory reason for the discharge? Was it changed to other in February? And does it stand the test of credibility with you? Because if you find that age or retaliation made a difference in the employer's decision, then under the Judge's instructions, you'll be able to find liability in favor of Mr. Conroy.

R:67:136.

A similar argument came from Conroy's counsel during rebuttal closing argument:

> A claim has been made, there is no confession. Nobody ever confesses in a discrimination case. You're going to have [to] weigh the testimony and decide do you think age had something to do with it. And I would suggest to you that when the man who fires him or without any warning, any documented reports of anything going wrong and comes up here with inconsistent statements that you can read into, that inconsistency and make an inference that, perhaps, the reason that was given by them may not have been the real reason.

R:67:165; AP:13a-13b.

The jury returned a verdict in Abraham Chevrolet's favor on both Conroy's age-discrimination claim and his retaliation claim. R:51. The final judgment was entered on October 21, 2002. R:52. Conroy filed a timely motion for a new trial (R:53), which the district court denied in an extensive order entered on February 13, 2003. AP:19a-29a; R:59. Conroy filed his notice of appeal on March 14, 2003. R:60.

C. The Decision of the Court of Appeals

Conroy raised two issues on appeal. First, he contended that the district court made an erroneous evidentiary ruling. Second, he asserted that the district court erred by refusing to give Conroy's requested pretext instruction to the jury. AP:2a. The Eleventh Circuit rejected both of Conroy's arguments.

In the majority opinion, two of the three members of the appellate panel concluded that the trial court did not err in refusing to give the jury Conroy's requested pretext instruction. AP:9a-14a. As an alternative basis for affirming the judgment, they also concluded, using a harmless-error analysis, that no reversal would be warranted even if the failure to give the instruction had been erroneous, because Conroy was not "prejudiced by the district court's failure to give his requested instruction." AP:14a.

The third member of the panel disagreed with the majority on the question of whether a pretext instruction, if requested, is required in discrimination cases. AP:15a-18a (Wilson, J., concurring in result). He nonetheless concurred that no reversal was required in this case because of his conclusion that "Conroy was not prejudiced

by the trial court's refusal to give his requested pretext instruction." AP:15a.

ARGUMENTS FOR DENYING THE PETITION

Although Conroy is correct in stating that the courts of appeals are divided on the question of whether it is erroneous for a trial court to refuse a requested pretext instruction in discrimination cases, that division is not sufficiently stark or fully developed yet to warrant this Court's clarification. Moreover, even if the issue in question were suitable for this Court's intervention now, this case would not be the appropriate vehicle for resolving that issue; because Conroy was not prejudiced by the district court's refusal to give his requested pretext instruction, Conroy would not be entitled to relief regardless of how the Court resolves the issue on which the courts of appeals are divided.

A. THE CONFLICT IN THE COURTS OF APPEALS REGARDING THE NECESSITY OF A PRETEXT INSTRUCTION IS NOT YET FULLY DEVELOPED OR IN NEED OF RESOLUTION BY THIS COURT

It is true that four circuits have held that a pretext instruction is sometimes required in employment-discrimination cases. Two of those decisions pre-dated this Court's decision in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). *See Smith v. Borough v. Wilkinsburg*, 147 F.3d 272, 279-81 (3d Cir. 1998); *Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994). The other two came after *Reeves*, and they were purportedly based, in

part, upon that decision. *See Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002)[6]; *Ratliff v. City of Gainesville*, 256 F.3d 355, 360-61 (5th Cir. 2001).

In each of these cases, the court concluded that a jury needed to be told, expressly, that it *could* make (but need not make) an inference of an employer's intentional discrimination if the jury disbelieved the employer's stated reason for its action. Otherwise, in the view of these courts, jurors might not realize that such an inference was permissible. *See Townsend*, 294 F.3d at 1241; *Ratliff*, 256 F.3d at 360-61; *Smith*, 147 F.3d at 280-81; *Cabrera*, 24 F.3d at 382.

Four other circuits – including the Eleventh Circuit in this case – have reached a contrary conclusion, opining that a pretext instruction is not invariably required in employment-discrimination cases. *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233-35 (11th Cir. 2004); *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 791 (8th Cir. 2001); *Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Palmer v. Bd. of Regents*, 208 F.3d 969, 975 (11th Cir. 2000); *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). The rationales of those courts was perhaps best explained in *Gehring*, in which the Seventh Circuit noted that "the *only* question the jury need answer" in employment-discrimination cases "is whether the plaintiff is a victim of intentional discrimination." *Id.* at 343 (emphasis in original). Thus, a "pretext" instruction is unnecessary.

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[6] *Townsend* was a 2-1 decision.

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, *the judge may and usually should leave the subject to the argument of counsel. Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.*

Id. (citation omitted; emphasis added).

The respective positions of the courts of appeals on this issue, though differing, are not yet fully crystallized,[7] however, and those courts continue to refine, clarify, and reexamine their views. For example, the courts of appeals that require pretext instructions have not yet fully addressed whether and to what extent a failure to give such an instruction automatically requires reversal. As an illustration of this ongoing development, the majority of a panel in the Fifth Circuit recently opined that the *Ratliff*

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[7] Four of the regional courts of appeals – those in the Fourth, Sixth, Ninth, and District of Columbia Circuits – have not yet addressed the issue in any reported decision. However, one panel of the Fourth Circuit, in an unreported decision, has held that a pretext instruction should be given but that a failure to give the instruction is subject to harmless-error review. *See Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133, 144-45 (4th Cir. 2003).

decision by an earlier panel was erroneous in concluding that a pretext instruction is mandatory in employment-discrimination cases. *See Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 577 (5th Cir. 2004). The majority in *Kanida* called for *en banc* reconsideration of *Ratliff*'s holding, while at the same time holding that the district court's failure to give a requested pretext instruction, even if erroneous, did not necessarily require reversal.[8]

It may well be true that this Court will eventually need to clarify this area of the law, but Abraham Chevrolet submits that it is too soon for the Court to do so now. For the moment, the issue should be left to the individual courts of appeals for further refinement and percolation. This Court should step in only if and when a stark conflict remains in the circuits after the courts of appeals have fully developed their respective positions. That point in time has not yet arrived.

B. THIS CASE PRESENTS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT IN THE COURTS OF APPEALS CONCERNING THE NECESSITY OF A PRETEXT INSTRUCTION

Even if this Court believes that it should undertake to determine, right now, the question of whether a pretext instruction is mandatory in employment-discrimination cases, this case is not the appropriate one for the Court to use to answer that question. The answer to the question

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[8] Conroy's case itself presents another example of the ongoing development of this issue in the courts of appeals. In the Eleventh Circuit's decision here, that court clarified its prior holding on this issue in *Palmer*. *See Conroy*, 375 F.3d at 1234.

makes no difference to the outcome here, because it is beyond serious dispute that the district court's failure to give Conroy's requested pretext instruction, even if erroneous, caused him no prejudice and was, at most, harmless error. The judgment in Abraham Chevrolet's favor therefore survives intact regardless of whether the district court erred in declining to give Conroy's requested instruction.

All three members of the panel in the Eleventh Circuit agreed that Conroy suffered no prejudice from the absence of a pretext instruction. *See* AP:13a-14a; AP:17a-18a (Wilson, J., concurring in result). And the applicability of a "harmless error" analysis in cases of this nature is something on which the courts of appeals are not divided; even the courts of appeals that require the use of pretext instructions have not held that the failure to give such an instruction automatically requires reversal irrespective of whether a plaintiff demonstrates that he or she suffered prejudice.[9]

Moreover, the members of the panel below were certainly correct in concluding that Conroy sustained no prejudice from the district court's refusal to give a pretext instruction. In that regard, it must be remembered that Conroy's case was extraordinarily weak. He presented two theories of liability: (1) that he was fired because of his age; and (2) that he was fired because he refused to terminate Weber. The uncontroverted evidence, however, was

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[9] Although Conroy attributes such a view to the Tenth Circuit by virtue of the *Townsend* decision (P:15), nothing in *Townsend* supports the suggestion that that court will automatically reverse, without regard to prejudice, whenever a trial court fails to give a requested pretext instruction.

that Conroy was replaced on a permanent basis by Clark, a man two years older than Conroy, and that Weber continues to work at the dealership to this day.

The trial court recognized the significance of these facts. In denying Conroy's motion for a new trial, the court noted that "[t]he uncontroverted evidence presented at trial was that the Plaintiff was replaced on a permanent basis by a man who was one year older (Randy Clark), and Dick Weber, age 70, is still employed at the dealership. Other trial evidence also undercut Plaintiff's allegations." R:59:3. And, indeed, there *was* more.

Conroy himself testified that the manufacturer standard for commercial sales is 12 vehicles per month. He also testified that he never sold 12 vehicles in any month, much less averaging 12 vehicles in the ten months he worked for Abraham Chevrolet. Additionally, the other salespersons in his department (apart from Weber) sold an average of only three or four vehicles per month – and those vehicles were not sold at acceptable profit levels. Conroy's excuse that he was not responsible for his deficient performance and that he needed 18 months to get up to speed was obviously rejected by the jury. The only person who was selling cars and generating money for the dealership was Weber, who continues to work there.

In the face of the evidence, it is hardly surprising that the jury returned a verdict in Abraham Chevrolet's favor. The jury was squarely asked to make a finding that Abraham Chevrolet engaged in intentional discrimination against Conroy – and that its articulated reason for discharging him was false. It did not do so, and its decision cannot reasonably be portrayed as the product of a misled or confused trier of fact.

Indeed, the evidence presented, jury instructions given, and arguments advanced made it obvious to the jurors that they could find for Conroy if they disbelieved Abraham Chevrolet's proffered reasons for terminating Conroy's employment. To suggest, as Conroy does, that the jury had to be told that it could make such an inference does not give jurors enough credit.

The entire focus of this case – by both sides – was the truthfulness of Abraham Chevrolet's stated reason for firing Conroy. Indeed, Conroy's counsel aptly described the entire trial when he told the district court at the charge conference that "[t]his is a pretext case." R:67:50. Consistent with that view, Conroy's attorneys devoted almost the entirety of their closing arguments (except for their discussion of Conroy's claimed damages) to the question of whether the jury should believe Abraham Chevrolet's proffered reason for Conroy's discharge. *See* R:67:127-39, 157-66.

No juror could possibly have had the slightest doubt that he or she could find for Conroy if the jury rejected the truth of Abraham Chevrolet's stated reason for terminating Conroy. That was precisely what Conroy's counsel, during closing arguments, expressly asked the jury to do. *See* R:67:136, 165. And, of course, neither the district court nor Abraham Chevrolet's counsel ever suggested, even remotely, that the jury could not properly make the inference that Conroy was asking the jury to make. Everyone in the courtroom – including the jurors – unquestionably understood that Conroy's claims stood or fell depending on whether Abraham Chevrolet was telling the truth on the

reason why Conroy was discharged.[10] Despite the protestations to the contrary by Conroy, no instruction was necessary to convey that point to the jury – and no prejudice resulted to him from the absence of such an instruction. The jury here merely chose to reject Conroy's factual contention that Abraham Chevrolet was lying in its explanation for Conroy's termination.

Thus, the record in this case reveals unequivocally that the presence or absence of a pretext instruction had no effect here. This Court would therefore be engaging in a mere academic exercise if it used this case to determine whether and to what extent a pretext instruction is required in employment-discrimination cases. Although that question is undoubtedly an important one, Abraham Chevrolet suggests that this Court's scare resources and valuable time should instead be devoted to cases presenting important questions to which this Court's answers actually affect the outcomes. *See, e.g.*, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). That is not the situation here.

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[10] As the district court recognized in denying Conroy's motion for a new trial, Conroy "rests his argument that an instruction on pretext was essential in this case upon the contention that the Defendant's agents were not credible witnesses." R:59:4.

CONCLUSION

For the foregoing reasons, Abraham respectfully requests that the Court deny Conroy's petition for a writ of certiorari.

Respectfully submitted,

JOHN R. HAMILTON
Counsel of Record

FOLEY & LARDNER LLP
111 North Orange Avenue
Suite 1800
Orlando, Florida 32801
Telephone: (407) 423-7656

Attorneys for Respondent

(2)

Supreme Court, U.S.
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No. 04-505

In The Supreme Court of the United States

GLENN J. CONROY,

Petitioner,

v.

ABRAHAM CHEVROLET-TAMPA, INC., d/b/a AUTOWAY CHEVROLET,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

CRAIG L. BERMAN
THE BERMAN LAW FIRM, P.A.
111 Second Avenue N.E.
Suite 810
St. Petersburg, Florida 33701
Telephone (727) 550-8989

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO BRIEF IN OPPOSITION

The respondent, Abraham Chevrolet, does not dispute the existence of the 4-4 split in the circuits over whether courts should give jurors pretext instructions in discrimination cases—a question the respondent concedes "is undoubtedly an important one." Resp. at 20. Nor does the respondent dispute the existence of the subsidiary 3-1 circuit split over whether the failure to give pretext instructions is prejudicial if the plaintiff is permitted to argue the substance of pretext to the jury. Ordinarily two undisputed circuit splits over questions of federal law, one of which involves most of the circuits, would be enough to justify review.

The respondent argues, however, that the Court should not grant certiorari because the petitioner, Glenn Conroy, supposedly suffered no prejudice. The argument rests on two grounds: Conroy was allowed to argue the substance of pretext to the jury in closing, and the jury probably would not have found for him even if it had been instructed on pretext. Neither is an appropriate basis to deny review.

1. Closing Argument Regarding Pretext is No Basis to Deny Review.

The respondent's contention based on Conroy's closing argument actually *supports* review because there is a 3-1 circuit split over whether closing argument regarding pretext is an adequate substitute for a pretext instruction. Pet. at 11-12. Whether closing argument adequately substitutes for a pretext instruction is, of course, closely

related to the primary question in this case: whether pretext instructions should be required.[1]

2. The Respondent Improperly Construes the Disputed Facts in its Favor to Argue Conroy Suffered no Prejudice.

Given that Conroy is seeking review following a court's failure to give a jury instruction, the facts are to be construed in his favor—not the respondent's. *Connecticut Mut. Life Ins. Co. v. Wyman*, 718 F.2d 63, 65 (CA3 1983) ("When the correctness or adequacy of a jury instruction is at issue, an appellate court may not review the evidence in the light most favorable to the verdict winner. There can be no deference to a factual finding tainted by legal error. If the jury was misled as to the law on a material point, '[a court] cannot presume that the jury applied the appropriate standard in deciding [an issue].'") (quoting *McPhee v. Reichel,* 461 F.2d 947, 951 (CA3 1972), and citing *Hunziker v. Scheidemantle,* 543 F.2d 489, 497-98 (CA3 1976)); *see also Caballero v. City of Concord*, 956 F.2d 204, 207 (CA9 1992) ("In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's

[1] Unsurprisingly, only two of the circuits requiring pretext instructions have felt compelled to state expressly whether closing argument is an adequate substitute to prevent prejudice. In *Townsend v. Lumbermens Mutual Casualty Co.*, 294 F.3d 1232 (CA10 2002), the majority directly rejected the dissent's argument that an "aggressive closing argument" based on pretext prevents prejudice to plaintiffs. *Id.* at 1241; *see also id.* at 1246-47 (Brorby, J., dissenting). In the other case, *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d 568, 579 (CA5 2004), a panel that disagreed with the circuit's binding precedent requiring a pretext instruction held that a pretext closing argument was an adequate substitute for the instruction.

verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.").

The respondent's "no prejudice" argument nonetheless ignores the procedural posture of this case by improperly assuming disputed facts in *the respondent's* favor. Most of those facts support the respondent's post hoc claim that Conroy was fired because he was an unsuccessful worker (Resp. at 7-8, 18), despite significant evidence that Conroy was an excellent worker and was not terminated based on poor performance (Pet. at 6, 17). Since that claim is adequately addressed in the Petition, there will be no further reply here.

The respondent makes one discrete factual argument that does, however, require a direct reply. The respondent asserts that the jury probably would have found for the respondent even if the district court had given a pretext instruction because Conroy was replaced by an *older* worker. But the respondent initially replaced Conroy with a substantially younger worker and only fired that younger worker, and replaced him with someone one year older than Conroy, *after* Conroy complained of age discrimination to Human Resources Director Roberta Bonavia. Pet. at 4-5, 16-17.

The respondent nonetheless improperly claims—as fact—that Conroy did *not* tell Ms. Bonavia that he believed he was fired because of his age when he met with her about unemployment compensation:

> Conroy did not initially allege at that time, however, that he had been fired because of his age. R:66:95; R:67:7-8. Instead, Conroy conveyed to

> Bonavia his alleged belief that he was terminated for refusing to fire Weber. R:67:7-8.

Resp. at 6-7. In fact, Conroy testified that that is *exactly* what he told Ms. Bonavia: "[I] told her the situation that I felt that I was being discriminated against because of my age." Doc. 66 at 94-95. (The relevant portion of Conroy's testimony is included as an appendix to this Reply Brief.)

Respectfully submitted,

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

CRAIG L. BERMAN
THE BERMAN LAW FIRM, P.A.
111 Second Avenue N.E.
Suite 810
St. Petersburg, Florida 33701
Telephone (727) 550-8989

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

Counsel for Petitioner

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Glenn J. Conroy,

Plaintiff,

Vs.

CIVIL ACTION NO.
01-01466CV-8-T-27MAP

Abraham Chevrolet-Tampa, Inc.

Defendant.

United States Courthouse
Tampa, Florida
October 17, 2002

BEFORE: HONORABLE JOSEPH H. RODRIGUEZ
UNITED STATES DISTRICT JUDGE

* * *

[94] Q. Okay. Did you ever contact Miss Bonavia about your employment situation?

A. Yes, I did.

Q. When was that?

A. After I was let go.

Q. What did you talk about with her?

[95] A. Basically told her the situation that I felt that I was being discriminated against because of my age. Again I was fired so I did go to her kind of late at the time but I went to her, spoke to her about that. Spoke to her about being fired because oh [sic] retaliating against not firing Mr. Weber.

Q. Let me ask you something. Did you talk to Miss Bonavia before you got your unemployment compensation

paperwork that said you'd been let go for poor performance?

A. I think I went over there with that.

Q. Okay. So, before you got the unemployment compensation paperwork that said they had let you go for poor performance, you didn't think to tell anybody you felt it was age discrimination?

A. Other than her.

Q. But you didn't go to her before you got the paperwork, did you?

A. No. No.

Q. Okay. So, you didn't say anything to anybody about age discrimination until you got the paperwork that said you'd been let go for poor performance. Isn't that true?

A. That's true. Because that's not the reason why I was let go. And Miss Bonavia instructed the Human Resource officer at Autoway in Tampa to change it, after I believe she spoke to Mr. Bledsoe.

Q. But in the time after you were let go to when you got [96] that paperwork, did you think it was age discrimination?

A. Yes.

* * *